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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANK RICHARD CICHOCKI, JR.

Appeal 2009-014574
Application 10/727,367
Technology Center 3700

Before CAROL A. SPIEGEL, DONALD E. ADAMS, and
JEFFREY N. FREDMAN, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

This appeal under 35 U.S.C. § 134 involves claims 1, 2, 4, and 6. We have jurisdiction under 35 U.S.C. § 6(b).

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

The claims are directed to an active suture. Claims 1 and 2 are representative and are reproduced in "APPENDIX" of Appellant's Brief (App. Br. 21-22).

The rejections presented by the Examiner follow:

1. Claims 1, 4, and 6 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Burton.²
2. Claim 2 stands rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Burton and Davis.³

We reverse the anticipation rejection and affirm the obviousness rejection.

Anticipation:

ISSUE

Does the preponderance of evidence on this record support the Examiner's finding that Burton teaches the claimed invention?

FINDINGS OF FACT

FF 1. For clarity we reproduce Appellant's Figure 4b below

FIG. 4b

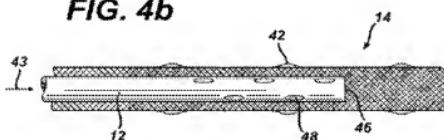


Figure 4b is a longitudinal cross-sectional view of a portion of an active suture and illustrates a passageway 12 that has a distal end 46 disposed

² Burton, US 4,159,720, issued July 3, 1979.

³ Davis et al., US 3,474,703, issued October 28, 1969.

between the proximal and distal ends of the braided suture 14 (*see, e.g.*, Spec. 11: 11-16).

FF 2. The Examiner recognizes that “Burton does not specifically disclose wherein the distal end of the passageway is disposed between the proximal and distal ends of the braided suture” (Ans. 3).

FF 3. Burton teaches a wick that (1) may be made of an absorbent suture material and (2) can serve as a suture as well as a carrier or conduit for delivering fluid to an affected area (Burton, col. 4, ll. 28-42).

FF 4. Burton teaches that “[t]he ends of the wicks absorb the fluid that is gradually fed along the length of the wick by absorption or capillary action” (Burton, col. 5, ll. 6-8).

FF 5. The Examiner reasons that since Burton teaches that the braided suture material absorbs fluid “suture material must be present at the distal end to take in the fluid” (Ans. 4).

ANALYSIS

Appellant contends that “the [E]xaminer incorrectly characterize[s] Burton as disclosing that suture material must be present or is inherent at a distal end to take in fluid” (App. Br. 15; Cf. FF 5). We agree.

The Examiner failed to establish an evidentiary basis to support a conclusion that in order for Burton’s wick, which is made of absorbent material, to serve as a carrier or conduit the distal end of the passageway in Burton’s wick must necessarily (i.e. inherently) be disposed between the proximal and distal ends of the braided suture.

CONCLUSION OF LAW

The preponderance of evidence on this record fails to support the Examiner’s finding that Burton teaches the claimed invention. The rejection

of claims 1, 4, and 6 under 35 U.S.C. § 102(b) as being anticipated by Burton is reversed.

Obviousness:

ISSUE

Does the preponderance of evidence on this record support a conclusion of obviousness?

FINDINGS OF FACT

FF 6. The Examiner interprets the term “tube” as recited in Appellant’s claim 2 as being distinct from the term “passageway” as recited in Appellant’s claim 1. Specifically, the Examiner finds that “[a] passageway is simply a lumen or corridor, whereas a tube is a hollow body and therefore is a separate component” (Ans. 6).

FF 7. The Examiner finds that Burton does not specifically disclose a tube within the lumen of a suture (Ans. 4).

FF 8. The Examiner relies on Davis to teach “a braided wick for transmitting fluids . . . [that] comprises a hollow inner braid within an outer braid where[in] the inner braid comprises openings between the braided filaments” (Ans. 4).

FF 9. The Examiner finds that Davis teaches that the configuration of the inner and outer braided filaments “provides an efficient method of transporting . . . fluid along the length of the wick through capillary action” (*id.*).

FF 10. Davis teaches that the flow through the capillary device will depend, *inter alia*,

[U]pon the diameter of the filaments used in preparing the braid. It can be appreciated that the larger the diameter, the larger will be the open areas between the various filaments of the braid and, accordingly, the greater will be the rate of flow. Also, some control over the open areas can be obtained by using filaments having differing diameters or filaments having non-circular cross sections.

(Davis, col. 3, ll. 66-74.)

ANALYSIS

We are not persuaded by Appellant's contention that "Davis does not disclose a hollow inner tube" (App. Br. 17; *Cf.* FF 8). We are also not persuaded by Appellant's contention that Davis "is silent with respect to the relationship or advantages of the ratio of the diameters of the outer braid . . . and the inner braid" (*id.*; *see also* Reply Br. 8-9; *Cf.* FF 9-10). Instead, we agree with the Examiner's conclusion that

Although Davis does not specifically disclose the ratio of the outer diameter of the inner tube to the inner diameter of the tube, it would have been obvious to one of ordinary skill at the time of the invention for Davis to also comprise a tube diameter ratio of greater than 1.7, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art.

(Ans. 5.)

We recognize Appellant's contention regarding the disclosed advantages of the active suture (*see* App. Br. 18). However, for the reasons set forth by the Examiner, we find Appellant's contention and disclosed advantages are not commensurate in scope with the claimed invention (*see* Ans. 9-10). For the foregoing reasons, we are not persuaded by Appellant's contention that they "are entitled to claim more broadly than the representative examples of the experimental evidence" (Reply Br. 9). While this may be true, absent evidence to the contrary we find no error in the Examiner's conclusion that the broader subject matter is encompassed by the prior art.

CONCLUSION OF LAW

The preponderance of evidence on this record supports a conclusion of obviousness. The rejection of claim 2 under 35 U.S.C. § 103(a) as unpatentable over the combination of Burton and Davis is affirmed.

Appeal 2009-014574
Application 10/727,367

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART

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